No. 84-363

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ALEXANDER L. STEVAS

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

NORTHEAST BANCORP, INC., UNION TRUST COMPANY and CITICORP,
Petitioners,

—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent,

—and—

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR PETITIONERS

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TABLE OF AUTHORITIES

Cases

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Constitutional and Statutory Provisions

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Other Material

Are State Laws Permitting Interstate Banking Constitutional?, American Banker, Dec. 15, 1982 2

Regional Banking Statutes and the Equal Protection Clause, 84 Colum. L. Rev. 2025 (1984) 2

R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978) 3

Supplemental Memorandum

Petitioners file this supplemental memorandum pursuant to Rule 35.5 of the Rules of this Court to draw the Court's attention to the recent decision in *Metropolitan Life Ins. Co.* v. *Ward*, No. 83-1274, slip op. (March 26, 1985), which is directly applicable to the case at bar. *Metropolitan Life*, which was handed down after petitioners filed their briefs in chief, substantially clarifies the requirements of the Equal Protection Clause in cases involving state discrimination against out-of-state corporations seeking to conduct local business. While petitioners' Commerce Clause and Compact Clause arguments are independently dispositive of this case, the Court may wish to consider the Equal Protection Clause as an additional ground for reversing the decision below.

I.

In *Metropolitan Life*, this Court examined an Alabama statute that taxed out-of-state insurance companies at a higher rate than domestic insurance companies. The Court held that Alabama's alleged interests in promoting domestic industry and encouraging in-state investment were not "legitimate under the Equal Protection Clause" when implemented by "the statute's impermissible classification based solely on residence" (slip op. 13).

In this case, petitioners challenge reciprocal Connecticut and Massachusetts statutes that permit full service banking within those states by bank holding companies located in New England, but boycott bank holding companies located in any other state. The residential classification drawn by these statutes presents a clear equal protection violation under the principles announced by this Court in *Metropolitan Life*.

First. The Connecticut and Massachusetts statutes pick and choose among identically situated institutions in sister states solely on the basis of geographical location. It is difficult to imagine a more striking example of "the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent" (slip op. 8). As a former General Counsel of the Federal Reserve Board has observed:

> "What is the constitutional rationale for limiting entry to those holding companies from other New England States . . . ? A shared taste for milky clam chowder may not be sufficient to warrant discrimination against those favoring the tomato-based variety."

Hawke, *Are State Laws Permitting Interstate Banking Constitutional?* American Banker, Dec. 15, 1982, at 4 (Pet. App. A180).[1]

Second. The Massachusetts and Connecticut Acts share the same purpose and effect as Alabama's domestic preference tax—protection of the "home team." Connecticut and Massachusetts State Senators and Representatives stated that the legislation was intended to give "[o]ur banks . . . the space to grow," and "to protect what's theirs that's within their own state." The laws were designed to "give our banks . . . time to merge . . . and get as large as possible so we can thwart any intervention," particularly from "large New York banks" (Pet. App. A189; A158; A159; *see also* Pet. App. A157-A160). Even respondents acknowledge that the challenged statutes have the "goal of strengthening . . . indigenous entities" (BNE Br. 35; *see also* Conn. Br. 18; Mass. Br. 33-34).

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[1] *See also* Note, *Regional Banking Statutes and the Equal Protection Clause,* 84 Colum. L. Rev. 2025 (1984) (concluding that regionally restrictive interstate banking laws plainly violate the Equal Protection Clause).

Third. The Connecticut and Massachusetts Acts cannot be saved by the Douglas Amendment. As this Court held in *Shapiro* v. *Thompson,* 394 U.S. 618, 641 (1969), "Congress may not authorize the States to violate the Equal Protection Clause." Beyond this, the Douglas Amendment treats all states *equally and nondiscriminatorily* and regulates the interstate acquisition of banks in the *national interest.* By contrast, the Connecticut and Massachusetts Acts specifically discriminate against certain states in order to protect local interests.

Fourth. Respondents have suggested that the Connecticut and Massachusetts laws are designed in part to insure that the capital needs of those localities are met. The Court flatly rejected the same argument in *Metropolitan Life,* however, holding that increasing a locality's access to capital is not a legitimate purpose when advanced in a "plainly discriminatory manner" (slip op. 13).

II.

This Court has discretion to consider the equal protection question even though it was not presented in the petition for certiorari. *See, e.g., Capital Cities Cable, Inc.* v. *Crisp,* 104 S. Ct. 2694, 2699-700 (1984); *Newport* v. *Fact Concerts, Inc.,* 453 U.S. 247, 255-57 (1981); *Peters* v. *Kiff,* 407 U.S. 493, 495 (1972); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U.S. 313, 319-21 (1971); R. Stern & E. Gressman, *Supreme Court Practice* 458-61 (5th ed. 1978). The equal protection issue was presented in both proceedings below (*e.g.,* Ct. App. JA290-300; JA 328-472; JA1200-19; JA1438-39; JA1477-86; JA2153-56; Ct. App. Conn. Br. 31-37; Ct. App. CBT Br. 42-47; Ct. App. HNC Br. 30-32). Both the Board and the Court of Appeals discussed and decided the constitutionality

of the Connecticut and Massachusetts Acts under the Equal Protection Clause (Pet. App. A52-A55; A32-A33).

The Court of Appeals upheld the discriminatory statutes on the ground that "the . . . statutes appear to be designed to foster banking and related activities in these and in neighboring New England states" (Pet. App. A33). The goal of "fostering" parochial commercial interests by discriminating on the basis of residence is precisely what this Court held invalid in *Metropolitan Life*.

III.

In light of the recent clarification of equal protection law in *Metropolitan Life*, the Court may wish to correct the plain error in the decision below and declare the Connecticut and Massachusetts laws to be inconsistent with the Equal Protection Clause. In view of the importance to the nation of obtaining an authoritative resolution of the constitutional validity of regional banking legislation and avoiding additional burdensome litigation, a decision by this Court addressing the Equal Protection Clause, along with the Commerce Clause and the Compact Clause, would be consistent with the public interest. If the Court wishes to have the equal protection issue raised by motion to amend the petition for certiorari to include an additional question, petitioners request the Court to treat this memorandum as such a motion. The Court may also wish to direct the parties to file concise supplemental briefs limited to the equal protection issue.

Respectfully submitted,

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